

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 6, 1998

TO: William C. Schaub, Jr., Regional Director, Region 7

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Box JJJ, Case 7-CA-39650

596-6080-5000, 850-2001, 850-2083-2800

This Section 8(a)(3) case was submitted pursuant to OM 98-65 for advice as to what action to take where the charge names an unknown Employer which advertised for electricians through a "blind" newspaper advertisement⁽¹⁾ and which did not respond to a Union, Local 692 IBEW, letter enclosing 8 resumes from clearly-identified Union supporters, mailed by the Union to that "blind" box at the newspaper. The Union received no response, and filed the instant charge approximately three weeks later. The Region then issued an investigative subpoena to the newspaper, seeking the identity of the employer which purchased the ad. The newspaper, the "Midland Daily News" (Midland), refused to comply with the subpoena. Subpoena enforcement proceedings were held in abeyance pending the Sixth Circuit's decision in a previous Midland case. Midland is now relying on the Sixth Circuit's recent refusal to enforce a similar subpoena against it in *NLRB v. Midland Daily News*.⁽²⁾

We agree with the Region that the instant charge should be dismissed, absent withdrawal, since the identity of the employer is unknown and since this matter arises in the Sixth Circuit and is not sufficiently distinguishable from the facts in *Midland Daily News* to warrant an attempt at subpoena enforcement proceedings.

Thus, in *Midland Daily News* the Sixth Circuit affirmed a district court's denial of enforcement of a Board subpoena against Midland, seeking documents identifying the employer which placed a "blind" ad seeking electricians. The court found that the advertisement was a form of lawful commercial speech protected by the First Amendment, and that the Board had failed to persuade the court that exercise of its subpoena power "is the least extensive means by which the Board could reasonably expect to proceed, without unnecessarily burdening Midland's constitutional right to free expression", 158 LRRM at 2921. The court further stated that the Board exceeded its constitutional subpoena power "after being presented with [union] speculations of discrimination voiced only three days after the complainants had filed their applications, absent any factual support for its action, and before it had developed or implemented a less intrusive means to conduct its investigation", 158 LRRM at 2922.

We agree with the Region that, on the facts and circumstances of this case, neither the Union nor the Board would be able to meet the burden within the Sixth Circuit set forth in *Midland Daily News* for enforcing an investigative subpoena. Thus, this case is factually similar to *Midland Daily News* and we would not find the fact that the Union waited approximately 3 weeks after mailing the resumes before filing its charge adequate, by itself, to distinguish *Midland Daily News*. In this regard, the Sixth Circuit was not persuaded by the argument that the Union never heard from the unknown employers even though the charges were filed within days of the submitting of resumes to the "blind" ad. In this regard, there is no indication that the Union attempted to show discrimination or to ascertain the employers' identities by, for example, submitting a resume which did not clearly identify the applicant as a Union member to see if such an application garnered a response.

The Board could not, on these bare facts, convincingly argue that the unknown employer at Box JJJ must have been discriminating against Union applicants.

Where the employer is unknown, and an investigative subpoena would not be enforced to enable the investigation to proceed, we conclude that the instant charge should be dismissed, absent withdrawal.

B.J.K.

¹ The advertisement did not list the Employer seeking job applications and did not provide a postal address; instead, it directed that applications be sent to "Box JJJ" at the newspaper's address.

² ___ F.3d ___, 158 LRRM 2919 (6th Cir. July 16, 1998).